

02.07.2025
Item No.02
Ct. No.446
RP

CO 2662 of 2024
Subrata Roy
Vs.
Kajal Roy & Ors.

Mr. Aniruddha Chatterjee, Sr. Adv.
Mr. Iftekar Munshi
.... For Petitioner

1. This revisional application is directed against the order no.55 dated 4th July, 2024 passed by the learned Judge, 5th Bench, City Civil Court at Calcutta in OC No.28 of 2018 whereby the application filed under Order 18 Rule 17 of the Code of Civil Procedure was rejected.
2. Learned senior advocate appearing on behalf of the petitioner submits that the petitioner is the executor of the last will and testament dated 10.12.2024 executed by the deceased Netai Roy @ Netai Chandra Roy which was duly registered in the office of the Additional Registrar of Assurance Calcutta for the year 2004. The wife of the said testator Smt. Gita Roy was also died on 5th July, 2012, and the present opposite parties and the petitioner are the legal heirs of the said testator. The petitioner, being the executor of the said will and testament, filed an application under Section 276 of the Indian Succession Act, 1925 for grant of probate to the said last will and testament of the deceased Netai Roy on

the basis of the certified copy of the said will and testament.

3. It is further submitted that the original will was all along with the present opposite parties and one Title suit was also filed by the present petitioner, being TS 1110 of 2013 for declaration and permanent injunction touching the issue. The said suit was dismissed vide judgment dated 31st August, 2018 by the learned Judge, City Civil Court at Calcutta. Challenging the said judgment an appeal has been filed, which is still pending.
4. It is further argued that the said application under Section 276 of the Indian Succession Act became contentious after the opposite party entered appearance and the case reached at the stage of argument when the petitioner took out an application under Order 18 Rule 17 of the Civil Procedure Code read with Section 151 of the Civil Procedure Code with a prayer to recall the witness in order to bring on record the evidence adduced by the present opposite parties in TS 1110 of 2013,
 “suit premises is three storied building. It is under lock and key. Key of the lock of the suit premises is with me plaintiff is my elder brother. I did not inform my elder brother about retaining key of the suit premises in my possession. Exhibit 13 is the last will executed by the testator Netai Roy my father in

respect of the suit holding. My elder brother Subrata Roy has been appointed as executor of that will as per written pleasure of my father Netai Roy containing exhibit 13”.

5. The learned trial Court by an order dated 4th July, 2024 refused the prayer on the ground that the petitioner did not take any step to produce the document despite having knowledge of the same.
6. None appeared on behalf of the opposite parties despite the fact that the notice of this revisional application was sent and served upon the opposite parties as well as the learned advocate appeared before the trial Court on behalf of the opposite parties. Affidavit-of-service to that extent filed before this Court today be kept on record.
7. Order 18 Rule 17 of the Code of Civil Procedure reads as follows.

“The Court may at any stage of the suit recall any witness, who has examined him (subject to the law of evidence of the time being in force) put questions to him as the Court thinks fit.”

It is settled position of law that the power to recall witness may be exercised by the Court either suo motu or on the basis of an application filed by the petitioner and the Court has the discretion to consider the application subject to the satisfaction of the Court.

8. In the application filed under Order 18 Rule 17 of the Civil Procedure Code no where the necessity for recalling the witnesses and/or the reason for such long delay in taking out an application to incorporate the fact, which was very much within the knowledge of the petitioner has been found. The fact remains, the proceeding for grant of probate is in respect of the will executed by the father of the parties herein. In terms of the relevant provision of the Indian Succession Act the probate Court decides the legal validity and proper execution of the testator's will. Since the petitioner has filed the probate application on the basis of the certified copy of the will alleging that the original is lying under the custody of the opposite parties, considering the facts and circumstances, this Court is of the view that even though there is a negligence on the part of the petitioner to bring on record the said fact much earlier it may be considered as lacuna which if cured will not prejudice the interest of the opposite parties. The petitioner is to prove his own case by proving the will under the parameters of the relevant provision of the Indian Succession Act. In view thereof, this Court is of the considered view that the said prayer of the petitioner under Order 18 Rule 17 of the Civil Procedure Code is liable to be allowed subject to payment of cost of Rs.2000/- to be paid to the

opposite parties and to file an acknowledgement of receipt to that extent by the opposite parties before the learned Court.

9. Hence, this revisional application stands allowed.

The order of the learned trial Court is hereby set aside.

10. Since the opposite parties have not appeared and the order passed in their absence the allegations, if any, levelled against them are deemed to be not admitted.

11. Urgent Photostat certified copy of this order, if applied for, be delivered to the learned advocates for the parties, upon compliance of all formalities.

[CHAITALI CHATTERJEE (DAS), J.]